

2/0082

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

CSX TRANSPORTATION, INC.,

Defendant.

STB Docket No. 42070

ENTERED
Office of Proceedings

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Part of
Public Record

**CSXT'S REPLY IN OPPOSITION TO COMPLAINANT
DUKE ENERGY'S MOTION FOR EXTENSION OF TIME TO
ELECT WHETHER TO SEEK PHASING OF CSXT'S REASONABLE RATES**

Defendant CSX Transportation, Inc. ("CSXT") respectfully submits this Reply in opposition to Duke Energy Corporation's ("Duke") "Motion for Extension of Time to File Petitions for Reconsideration and for Stay of Date by Which Complainant is to Advise the Board Whether it Wishes to Seek Relief Under the Phasing Constraint" ("Motion"). CSXT does not oppose Duke's request for a 30-day postponement of the date for filing petitions for reconsideration. Duke's additional request for a further extension of the 30-day period within which the Board specified that Duke must decide whether it will seek phasing, however, is neither reasonable, efficient, nor appropriate. The Board should deny Duke's request to delay indefinitely Duke's opportunity to request phasing – relief that Duke did not seek in its Complaint, or at any other time during this proceeding, and for which there is not one scintilla of support in the record – and direct it to comply with the Board's February 4, 2004 Decision, requiring Duke to advise the Board by March 5, 2004 whether it intends to seek phasing.

INTRODUCTION

Duke initiated this maximum rate reasonableness proceeding more than two years ago. See Complaint, STB Doc. 42070 (Dec. 19, 2001). From the filing of the Complaint – through

discovery, filing of evidence, briefing, and supplemental evidence – to the Board’s Decision issued earlier this month, one constant has been Duke’s oft-repeated insistence that it was critical that this case be heard and decided as quickly as possible, because “justice delayed is justice denied.” For example, when CSXT suggested, in its Motion to Compel Duke to produce relevant evidence, that a reasonable discovery schedule extension might be necessary to allow CSXT adequate opportunity to review that evidence, Duke responded that “CSXT’s *chutzpah* is amazing,” and proclaimed that “Duke strongly opposes any lengthening of the procedural schedule in this case.” Duke Reply to CSXT Motion to Compel at 7, 25. Duke also attempted to excuse flaws in its evidence (conceding that Duke’s “proofs in these cases are less comprehensive than its complaints”) by claiming that its paramount need for quick resolution outweighed considerations of presenting a more rigorous case. Duke contended it was presented

with the Hobson’s Choice of seeking an extension in the evidentiary schedule or doing the best stand-alone analysis it could under the adverse circumstances . . . Duke believed that justice delayed would be justice denied. It, therefore, chose to prepare and present to the Board . . . stand-alone cost calculations under the most challenging of circumstances.

Duke Opening Evid. I-11 to 12 (emphasis added). Later, when the Board reopened the record in this case and the parallel case Duke brought against Norfolk Southern, for the limited purpose of taking additional evidence regarding the costs and revenues attributable to rerouted crossover traffic (thereby extending the scheduled decision date by approximately 3 weeks), Duke complained loudly that the Board’s order violated the statutory deadline for decisions in SAC cases; created additional delay and inefficiency; and “burdened” it with “extended” “uncertainty.” See, e.g., “Response of Complainant Duke Energy Corporation to Board Order Served October 10, 2003” at 2-3, *Duke v. NS*, STB Doc. No. 42069 (Oct. 24, 2003). As recently as last month, Duke threatened to challenge the “propriety” of the Board’s decision to extend the schedule in this case (by a mere three weeks), in order to obtain necessary additional evidence.

See “Supplemental Evidence on Rerouted Traffic of Complainant Duke Energy Corporation” at 2 (Jan. 5, 2004).

On February 3, 2004, the Board issued a decision finding the challenged rates not unreasonable. See Decision at 7, STB Doc. No. 42070 (served Feb. 4, 2004). Ten days later, Duke had a remarkable change of heart: It petitioned the Board to delay indefinitely the date by which Duke must elect whether to seek phasing of the challenged rates, claiming that such a delay would somehow serve the interests of efficiency. See Duke Motion at 5 (seeking to postpone Duke’s phasing deadline until 15 days *after* the Board *decides* any reconsideration motion). Duke apparently has abandoned its earlier position that justice delayed is justice denied.¹

Moreover, because of the large margin by which the Board’s SAC analysis found the rates reasonable, the overwhelming likelihood is that, after the Board decides any reconsideration issues, Duke will be in no different position with respect to phasing than it is today. Significantly, Duke’s Motion contains no claim that its reconsideration petition will even allege (much less prove) errors that collectively would exceed the amount by which the Decision found SARR costs to exceed SARR revenues. Six months or a year from now, Duke would be faced with the same decision it confronts today – whether to seek phasing of a rate that the Board has found reasonable in its entirety. Sound decisionmaking practice, administrative and regulatory efficiency, and the interests of fairness and finality all strongly favor adherence to the Decision’s 30-day deadline for Duke to advise the Board whether it will seek phasing. Therefore, the Board

¹ Significantly, despite complaining bitterly about the magnitude of the challenged rates, Duke has not once sought to invoke the phasing constraint in this proceeding. Indeed, when the Board partially denied Defendants’ motions to compel in this case and the parallel case Duke brought against Norfolk Southern, the Board’s Order expressly found that the discovery sought was not necessary because “neither Duke Energy’s complaint, as amended, nor its opening evidence and argument addresses the phasing constraint issue. Accordingly, there is no need for discovery on th[e phasing] issue.” Decision at 11, STB Doc. Nos. 42069 & 42070 (July 26, 2002).

should deny that portion of Duke's Motion that seeks to postpone the deadline for Duke to elect whether to seek phasing.²

ARGUMENT

I. Duke's Determination of Whether to Seek Phasing Should Be Unaffected by Any Reconsideration Petition – Such a Petition is Highly Unlikely to Affect the Conclusion that the Challenged Rates are Reasonable in Their Entirety.

The Board's Decision found the challenged rates reasonable by a very large margin. *See* STB Docket No. 42070, Decision at 7, 32 (served Feb. 4, 2004). The cumulative net excess of SARR costs over SARR revenues was \$1.45 billion. *Id.* at 32. Unless Duke's reconsideration petition somehow causes the Board to increase SARR revenues or reduce SARR costs by an amount sufficient to reduce this cumulative underpayment by \$1.45 billion or more – and Duke does not even suggest that it will – the Board's bottom-line conclusion will remain the same: the challenged rates are fully reasonable, and no rate reduction is appropriate.³ Not only does Duke's Motion not claim that Duke itself believes its reconsideration petition will identify \$1.45

² Duke's Motion also requests that the Board extend the deadline for the parties to file any reconsideration petitions by thirty days, to March 25, 2004. CSXT does not oppose this relatively reasonable extension request.

³ Indeed, even in *Duke/NS*, which involved very large computational errors that do not appear to be present in this case, and a significant change to the Board's method of calculating SARR traffic and revenues (both of which had the effect of substantially reducing the SARR's net overall shortfall), the total change in the net present value of the 20-year DCF was approximately \$580 million, or less than 40% of the \$1.45 billion net cumulative shortfall in this case. *Compare* Decision at 39, STB Doc. No. 42069 (Nov. 6, 2003) with Decision at 7, STB Doc. No. 42069 (Feb. 4, 2004). CSXT previously brought to the Board's attention, and the Decision has already corrected, the only error that CSXT identified as common to both cases brought by Duke – inadvertent double-counting of bridge abutments. *See* Decision at 98; CSXT Petition for Leave to Correct the Record at 2-5 (Dec. 8, 2003). Avoiding that error alone would reduce the overstatement in the *Duke/NS* case by approximately \$278 million. *See* Decision at 2, STB Doc. No. 42069 (Feb. 3, 2004). With the single exception of the bridge abutment double-count – which the Decision already addressed – CSXT believes there are no extraordinary errors in its evidence or the Decision in this case, and that any reconsideration motion will likely involve significantly smaller amounts of SARR costs and revenues. In any event, even changes of the magnitude present in *Duke/NS* would not even approach the level necessary to change the Board's determination in this case that the rates were below a maximum reasonable level.

billion in legitimate errors, CSXT's own review of the Decisions has identified no errors remotely approaching that magnitude.

If, after the Board rules on any reconsideration petitions, it continues to find the challenged rates reasonable in their entirety, Duke's position with respect to phasing would be exactly the same as it is today. Given the very large margin by which the Board found SARR costs exceeded SARR revenues, the extremely remote and speculative possibility that the Board might reverse itself and find the challenged rates unreasonable is wholly inadequate to justify Duke's request for indefinite postponement of its deadline to advise the Board whether it will seek phasing.

II. The Phasing Extension Duke Requests Would Be Inefficient and Deny the Board the Opportunity to Consider and Decide all Relevant Disputes and Issues at One Time.

For several reasons, extending the deadline for deciding whether to seek phasing would be inefficient, unfair, and unreasonable. First, Duke's proposal for serial post-Decision motions and proceedings would deny the Board the opportunity to consider and decide at the same time all of the parties' motions and requests for changes to the Decision. The best way for the Board to resolve issues the parties may wish to raise concerning the Decision is by having all of those issues presented at essentially the same time. This will allow the Board to consider the effect of one issue or dispute on others, and facilitate determination of all such issues as part of a consistent, overall whole. The contrary approach that Duke now advocates would require the Board to resolve issues piecemeal, and to reconcile reconsideration decisions and determinations with the Board's resolution of new (and perhaps unanticipated) issues arising in a phasing proceeding. In addition to its obvious inefficiency, such a piecemeal approach would also render much more difficult the Board's already complex task of making consistent and fully informed decisions based on the entire record and all the arguments of the parties.

Second, the extended schedule Duke proposes would likely significantly delay final resolution of the parties' dispute by deferring even the *initiation* of any phasing proceeding – which necessarily would involve significant discovery by CSXT from Duke and third parties

concerning the economic effects of CSXT's reasonable rates (and perhaps motions seeking to determine the appropriate scope of discovery), followed by multiple evidentiary submissions by both parties, briefing, oral argument and review and determination of phasing issues by the Board and its staff – until *after* the Board decides the parties' reconsideration petitions. If Duke elects to seek phasing on March 5, CSXT could conduct necessary discovery and the parties could prepare their evidentiary submissions during the time any reconsideration petitions are pending before the Board. Duke's extension proposal would defer that entire phasing discovery and evidence process until after the Board decides reconsideration petitions. Given the period of time it generally takes to decide reconsideration petitions in SAC cases, the *seriatim* approach Duke requests could delay a final decision in this matter for at least several months, and perhaps longer.⁴

Third, Duke's proposal would deny the parties finality, certainty, and the opportunity to conduct their business and business planning based on known parameters of a final decision. This case has been pending for more than two years, during which time both CSXT and Duke have faced uncertainty as to the rates Duke would ultimately pay for rail transportation of coal to the issue plants. Because of the significant amount of money at stake in this case, and the impact that the Board's final decision in this case may have on CSXT's contract negotiations with other shippers, continuing uncertainty makes business planning, accounting, contract negotiations, and communications with markets and investors difficult. Duke presumably has similar concerns, and thus would also benefit from the prompt, final resolution of the remaining issues in this matter. CSXT, its employees, and its investors are entitled to expeditious final resolution of this matter. Duke has offered no adequate countervailing reason for further delay and uncertainty.

The Board's experience in Duke's parallel pending case against Norfolk Southern illustrates the delay and inefficiency inherent in the approach Duke proposes. Contrary to

⁴ See, e.g., *PPL Montana, LLC v. BNSF Railway Co.*, STB Doc. No. 41185 (reconsideration petition filed Sept. 30, 2002, STB decided petition on March 24, 2003); *Wisconsin Power & Light Co. v. Union Pacific Railway Co.*, STB. Doc. No. 42051 (reconsideration petitions filed October 17, 2001, STB ruled on petitions May 14, 2002).

Duke's suggestion, the post-Decision approach followed in that case demonstrates the inefficiency and delay inherent in a piecemeal, multiple bites-at-the-apple approach, and counsels a different approach here. Following the Board's decision finding the challenged rates reasonable in Duke's case against Norfolk Southern (STB Doc. No. 42069), Duke filed an unauthorized (and out-of-time) motion to correct what it called "technical errors." Despite the fact that the Board's rules do not contemplate separate reconsideration motions for errors a party deems "technical" and errors it considers "non-technical," the Board agreed to consider that motion and to delay Duke's deadline for filing reconsideration petitions until after the Board decided Duke's first reconsideration motion regarding "technical errors."

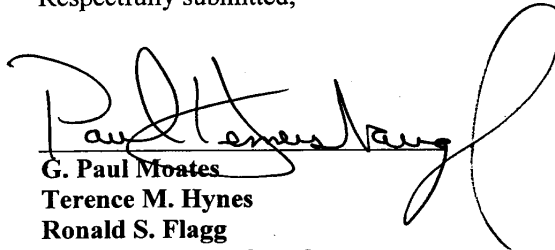
The Board decided Duke's technical error motion earlier this month, and the parties will now file their opening memoranda regarding remaining reconsideration issues (Duke's second bite at the reconsideration apple) on February 23, 2004, three months after Duke filed its first reconsideration motion, and nearly four months after the Board issued its initial decision in that case. Replies on reconsideration petitions in that case should be filed by March 15, 2004. Based on experience in other recent cases, it appears that the Board will take several months to decide the parties' reconsideration motions.

As a result of the series of post-decision proceedings in Duke's case against NS, the Board's final decision in that matter likely will not issue until approximately a year after the Board's initial decision, and three years after Duke filed the case. There is no good reason to impose similar delays in the final resolution of the present case against CSXT.

CONCLUSION

For all of the foregoing reasons, the Board should deny Complainant Duke Energy's request for an extension of the deadline for advising the Board whether it intends to seek phasing of the challenged rates.

Respectfully submitted,



Peter J. Shudtz
CSX Corporation
1331 Pennsylvania Ave., N.W.
Suite 560
Washington, DC 20004
202-629-2600

Ellen M. Fitzsimmons
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

G. Paul Moates
Terence M. Hynes
Ronald S. Flagg
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

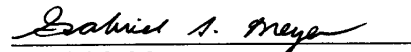
Counsel for Defendant CSX Transportation, Inc

DATED: February 17, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of February, 2004, I served the foregoing
"Defendant's Reply in Opposition to Complainant Duke Energy's Motion for Extension of Time
to Elect Whether to Seek Phasing of CSXT's Reasonable Rates" by causing five (5) copies
thereof to be delivered, via hand delivery, to:

William L. Slover
Robert D. Rosenberg
Christopher A. Mills
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036


Gabriel S. Meyer